Supreme Court, U.S.
NOV 9 1994

No. 94-662

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

Petitioners,

vs.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER JON DIAMOND
2115 Main Street
Santa Monica, California 90405
Telephone: (310) 399-3259

Counsel for Respondents

BEST AVAILABLE COPY

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3068
(213) 747-5631 • FAX: (213) 747-5643

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

New Orleans Public Service, Inc. v. Council of City of New Orleans (1989) 49 U.S. 350, 109 S.Ct. 2506 3

Younger v. Harris (1971) 401 U.S. 37, 91 S.Ct. 746 3, 7

NO. 94-662

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION,JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP

RESPONDENTS

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

Respondents Nevada Entertainment Industries, Inc. and Daniel Bishop, (hereinafter " Nevada Entertainment Industries"),

pursuant to Rule 12.4, hereby support Petitioners' request to review the Ninth Circuit's decision.

Respondents filed their own Petition, (No. 94-786), to review the same judgment for other reasons independent of the Petition in the instant case. The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court, having previously and expressly left open, should now resolve.

The open issue involves the critically important abstention doctrine and its application to Civil Rights litigation and related administrative proceedings. While

Respondents strongly disagree with Petitioners as to how this Court should resolve the issue, they do agree that this Court should accept this case to resolve the issue. The issue is whether the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) should apply to cases where the administrative action has become final.

In footnote 4 of its Opinion in New Orleans Public Service, Inc. v. Council of City of New Orleans, 49 U.S. 350, 109 S.Ct. 2506 (1989), this Court expressly stated that the issue was left open. Specifically, this Court stated in NOPSI,

"In Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), we held that the Younger doctrine prevented an injunction against an ongoing sex-discrimination proceeding before the Ohio Civil Rights Commission. The only other decision of ours arguably applying Younger to an administrative proceeding, Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982), similarly involved a situation in which the proceeding was not yet at an end. The fact that Dayton Christian Schools relied, as an alternative argument, upon the fact that the federal challenge could be made upon appeal to the state courts, see 477 U.S., at 629, suggests, perhaps, that an administrative proceeding to which Younger applies cannot be challenged in federal court even after the administrative action has become final. But we

> **have never squarely faced the question."** (Some emphases in original, some emphases added.) ___ U.S. at ____, 109 S.Ct. at 2518-2519, n.4.

In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question.

Respondents have an interest in having this matter resolved because the decision of the United States Court of Appeals for the Ninth Circuit in the instant case was initially published at 8 F.3d 1348 (9th Cir. 1993) and although later withdrawn, the various

district courts had been relying upon the "reasoning" of the Ninth Circuit to abstain in deference to local administrative proceedings. This has created great uncertainty in the "First Amendment Bar," and in those local City Attorneys who have to deal with issues involving adult bookstores, adult cabarets, and similar establishments. Because of the Ninth Circuit's decision below (although withdrawn), more adult bookstores, cabarets, and similar businesses are avoiding local administrative proceedings altogether and filing directly with the federal courts so as to avoid the abstention doctrine altogether. That is, the decision

of the Ninth Circuit below is causing many in the industry to avoid administrative proceedings altogether for fear of loosing their right later on to go to the federal court in case it should become necessary. There is a great deal of uncertainty that could be resolved by the grant of certiorari in this case.

Respondents, of course, are of the opinion that Younger does not apply after the administrative action has become final. The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion which is the subject of the Petition for Writ of Certiorari in the companion

case.

Accordingly, Respondents join in Petitioner's request that Certiorari be granted herein.

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Respondents